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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

D. E. WHEELER and D. W. RIDENOUR, partners doing business under the firm name and style of Wheeler & Ridenour,

Petitioners,

vs.

THE COUNTY OF PLUMAS,

Respondent.

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

U. S. WEBB,
C. N. POST,
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To the Honorable, the Supreme Court of the United States:

The petition in this case is mainly taken up with a discussion of the merits. Extended space is used, and many authorities urged upon the attention of the Court, all directed to the contention that the ordinance involved in this case was illegal and void. This same argument, on these same authorities, was presented to the Circuit Court and to the Circuit Court of Appeals, but found no favor with either.

We think it unnecessary to enter into a discussion of this subject, for the reason that we understand it to be the invariable rule of this Court to decline to enter into an examination of the merits, but that this Court, without examining the merits, will direct its inquiries solely to a determination of the question whether a proper case for this Court's intervention, through the writ of *certiorari*, is presented.

The attention of the Court is respectfully called to "An "Act to establish Circuit Courts of Appeals and Define "and Regulate in certain cases the Jurisdiction of the "Courts of the United States and for other purposes."

Chapter 517 of United States Statutes at Large of 1891.

Section 6 of said Act, among other provisions, contains the following:

> "That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States. * * * *
>
> "And excepting, also, that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari*, or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in

the case as if it had been carried by appeal or writ of error to the Supreme Court."

The present controversy is one arising between citizens of different States, and jurisdiction of the Federal courts has been maintained upon the ground of diverse citizenship alone.

On the 4th of March, 1903, the Circuit Court of Appeals duly rendered a final judgment in the matter. From a reading of the above statute, it appears that the only manner in which petitioners could bring the case before the Supreme Court of the United States is by the writ of *certiorari*.

The cases in which the Supreme Court has issued the writ of *certiorari* since this Act went into effect are few in number, and the intention of the Court is unmistakable. The grounds upon which the Supreme Court will require by *certiorari* a case to be certified from the Circuit Court of Appeals are divided as follows:

1. The case must be one of unusual gravity and importance, or,

2. There must be a necessity of avoiding conflict between two or more courts of appeal or between the federal courts and the courts of a State.

Petitioners' main reliance is upon

American Const. Co. v. Jacksonville Ry., 148 U. S. 372-88, and

Forsyth v. Hammond, 166 U. S. 506.

Neither of these cases, however, furnish authority for the issuance of the writ here prayed for upon the facts

disclosed by this record, and the Court is here asked to go to far greater length than it has gone in either of these cases, or in any other case to which our attention has been called.

In the first of these cases this Court points out, at considerable length, and with much care, the character of questions that must arise in order to justify the issuance of the writ of *certiorari*, and at page 383 say that the right of the Supreme Court to require, by writ of *certiorari*, the case to be brought to this Court for review " has been held to be " a branch of its jurisdiction which should be exercised " sparingly and with great caution, and only in cases of " peculiar gravity and general importance, or in order " to secure uniformity of decision."

That case involved the question whether a Judge who participated in the decision of the Circuit Court of Appeals was disqualified so to participate, and whether the judgment entered was, by reason of such disqualification, void. In that case the Court declined to issue the writ *ex parte*, but granted a rule to show cause why the writ should not be issued, etc., and later, as we understand the note found at the close of the decision, on page 388, the application for the writ was dismissed upon motion of petitioner.

From this it will be seen that the facts involved in that case were entirely dissimilar to the facts presented by the petition here. That was a question of great public moment and gravity; this is one of purely private interests. No public question is involved, no new principle of law is

declared, and the case is of interest and importance only to the parties to it.

The second case relied upon by petitioners is not more helpful to their contention. That case, at the instance of the petitioner, had been carried to the Supreme Court of the State of Indiana, and the judgment of that Court sought and obtained, and that judgment being adverse to the contentions of petitioner, subsequent to its rendition, the petitioner presented the same facts to the United States Circuit Court, and the decision of the Circuit Court was also against her contention, and in full harmony with the decision of the Supreme Court of the State. Thereafter, by proper proceeding, petitioner caused her case to be carried from the Circuit Court to the Circuit Court of Appeals for review, and the Court of Appeals, after hearing, reversed the decision of the Circuit Court.

The decision of the Supreme Court of the State of Indiana was rendered before the case was carried to the Federal courts, and it was a decision upon a question purely local in character, involving strictly a policy of the State, and under well established rules, upon the questions involved, binding upon the Federal courts.

The case here presented by the petitioners is strikingly different. This case was first instituted in the proper State court, and upon motion, and at the instance of petitioners, was removed to the Circuit Court of the Ninth Circuit. Judgment in this case was never reached in the State courts. The United States Circuit Court was the court of petitioners' choosing, and the case was there prosecuted to judgment, and that judgment being adverse

to petitioners, they carried the case, by writ of error, to the Circuit Court of Appeals, and there, after full hearing, by unanimous court, the judgment of the Circuit Court was affirmed.

Petitioners asked for a rehearing, and after examination, likewise by unanimous court, the request was denied. The distinction between *Forsyth v. Hammond, supra,* and this case is well presented by the following language of the Court, taken from the opinion in that case, at page 520:

> "In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not, as in the *Burgess* case, after the judgment in the Circuit Court. In the second place the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of *res judicata.*"

The writ of *certiorari* is not intended to render nugatory the provisions of the statute making the Circuit Court of Appeals the court of last resort in many cases. That court was created for the purpose of affording relief to the Supreme Court of the United States, and if all cases involving questions like and kindred in character to the question here presented, may be in this Court reopened and re-examined, through the instrumentality of this writ, the Circuit Court of Appeals becomes a court of last resort only in name, or theory, and the purpose of its creation is defeated, and its usefulness extinguished.

If this case may be so brought here for review, it is not without some difficulty that a case can be found in which the litigation ends with the decision of the Circuit Court of Appeals.

In the determination of all questions of contract or of rights arising out of transactions in the nature of contract and the laws governing the same, the Federal courts are not bound by previous decisions of the State courts, although the existence of a contract or of obligations in their nature contractual, requires the construction of State constitutions and laws.

In

Ohio Life Insurance and Trust Co. v. Debolt, 57 U. S., page 432,

the Supreme Court said:

> "It has been contended, on behalf of the defendant in error (the treasurer of the State), that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the State courts to their own constitution and laws. But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon

this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State."

We also quote from the decision of the Supreme Court in *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S., page 256.

"The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this court."

So we maintain, in the present case, that the decision of the Circuit Court of Appeals was upon the question as to whether rights had already arisen under the ordinance of Plumas County and whether such rights had vested thereunder. If it be maintained that, in determining this question, the Court of Appeals was compelled to construe the State law on the subject and the ordinance itself, still said Court would not be bound by previous decisions of the Supreme Court of California, much less to be controlled by decisions subsequently rendered. If, in the present case,

the Federal courts are absolutely independent of the Supreme Court of California, then this would not be a case where the Supreme Court of the United States should intervene on the writ of *certiorari*.

We claim further, however, that the proposition upon which the State court differed from the previously rendered decision of the Circuit Court, was a principle of general law and no abstruse reasoning in the construction of any statute of the State was required in its decision. The following extracts from the opinion of the Circuit Court of Appeals in this case aptly show the question before that Court for decision:

> " Counsel for plaintiff in error contend, that inasmuch the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was existing law, and rely upon *the rule announced in many authorities,* that where the right and remedy is given by statute to bring a civil action for the collection of a license tax, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause. * * * *
>
> " The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or personal property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract."

The decision of the Court is supported by general principles of law and the trend of authority in the United States, and does not depend upon the construction of a Statute of the State. Consistent with such authority, it was the view of the Court that the license fee or tax, under the ordinance in question, after it had become due and after the preliminary steps had been taken for its collection, had become a debt due upon a transaction in the nature of a contract, and the right of the county to pursue its remedy against the delinquent debtors had not been taken away by the Act of 1901.

In the case of *Sorona v. Curtin,* 137 Cal. 583, the Supreme Court of California had before it an ordinance which contained a penal clause providing that any persons carrying on the business in the ordinance specified without a license could be fined upon conviction, etc. The Court in that case applied the rule applicable to strictly penal statutes, and held that the repeal of a penal statute, without a saving clause, stopped the proceeding in the exact stage at which it was pending at the time of the repeal.

The question, then, upon which the State court and Federal court seem to differ is as to whether this rule which has been applied to penal statutes should also be extended to statutes giving a civil remedy. This is purely a question of general law, admitted by petitioner himself in his brief, for on page seventeen thereof he says:

> " Since, then, this ordinance was enacted solely as a revenue measure and since under the law of California as it stands to-day, the Board of Supervisors of the county respondent is divested of authority to enact the ordinance and it stands repealed, the question is

presented: What is the effect of the repeal upon the right of the county to maintain this action instituted before the repeal?"

In *Sonora v. Curtin* the Supreme Court supports its holding by the following cases:

Spears v. County of Modoc, 101 Cal., page 303;
Anderson v. Byrnes, 122 Cal. 273;
Napa State Hospital v. Flaherty, 134 Cal. 315;
Ball v. Tolman, 135 Cal., 375.

An examination of these cases shows that they but reiterate the rule that the repeal of a penal statute, without a saving clause, has the effect to deprive the court in which an action under the statute is pending, of all power to proceed further in the matter. It was this view alone that engaged the attention of the Court in that case, as appears from the following quotation from the opinion:

"The right given the plaintiff in this case, being penal in its nature, and the remedy created solely by statute, its enforcement is dependent upon the statute alone. It is still inchoate, and not reduced to possession nor perfected by final judgment. In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

The ordinance involved in this case was adopted by the governing body of the respondent county on the 9th day of January, 1900, and after it went into effect, to-wit: on the 1st day of May, 1900, petitioners commenced the prosecution of their business in Plumas County, without paying the license fee or tax provided for in the ordinance, and continued to carry on such business until the 10th day of July, 1900, and on the 11th day of July, 1900, this suit was

commenced. The business was thus commenced and completed long prior to the Act of 1901, and the suit to recover the money due the county was commenced and petitioners had appeared therein long before such Act was passed.

On this state of facts, the Circuit Court, and later, the Circuit Court of Appeals, held that the right of the County to the money had become vested, that naught remained to be done but to enforce its payment, and that it was the right of the County to prosecute its action to final judgment, irrespective of the Act of 1901. In reaching this conclusion, construction of particular statutes of the State was not required, but the Court needed only to invoke general rules of law, long and well established.

Upon the 11th day of August, 1900, an order was made upon the motion of petitioners removing this cause into the United States Circuit Court, Ninth Circuit, Northern District of California. On the 7th day of September, 1900, petitioner filed demurrer to the complaint which brought up the question as to the right of respondent to maintain this action by reason of the so-called repeal effected by the Act of 1901, of the power to license for revenue conferred upon the Board of Supervisors by the County Government Act. On the 25th day of November, 1901, the Circuit Court overruled the demurrer. Upon the 7th day of March, 1902, judgment by default was entered against the petitioners in favor of the respondent as prayed for in the complaint. Thereafter on the 5th day of May, 1902, the case was certified to the Circuit Court of Appeals, on a writ of error. On the 14th day of October,

1902, in that Court, the cause was argued and submitted. Thereafter on the 13th day of November, 1902, the case of *Sonora v. Curtin,* 137 Cal., 583, was decided. Upon the 4th day of March, 1903, the Circuit Court of Appeals rendered its decision affirming the decision of the Circuit Court. As a matter of fact the case of *Sonora v. Curtin* was not decided until after the present case had been argued and submitted to the Circuit Court of Appeals.

It is an established rule that Federal courts are not bound by the decisions of State courts made after contracts and transactions in the nature of contracts have been entered into and rights thereby have become fixed. And, of course, are not so bound when the Federal court has rendered its decision before the State court has spoken.

The leading case on this subject is

Burgess v. Seligman, 107 U. S., page 20.

That case involved the construction of a Missouri statute which provided that persons holding stock in Missouri corporations as collateral security should not be liable for unpaid assessments on such stock. Three suits were brought against Seligman for unpaid assessments. Two of these suits were in the State court and the other was in the United States Circuit Court. Seligman held the stock as collateral security, having received it as collateral from the corporation issuing it. He claimed that under the Missouri Statute referred to he was exempt from liability to creditors for unpaid assessments. This view was adopted by the United States court and from the judgment the creditor appealed to the Supreme Court. Pend-

ing this appeal, the two suits in the State court were decided adversely to Seligman and appealed to the Supreme Court of the State. The Missouri court affirmed the judgments against Seligman, holding that under the proper construction of the Missouri statute the exemption generally applied to one holding unpaid shares of stock as collateral security from the corporation itself. These decisions were delivered before Seligman's case, pending in the Supreme Court of the United States, came on to be heard. Upon the trial in the latter Court, it was pressed upon the Court that the opinion of the Supreme Court of Missouri, construing the Missouri Statute, conclusively determined its meaning. The Court, speaking through Mr. Justice Bradley, thoroughly reviewed this contention, and disapproved of it.

The opinion is most instructive and, under it, these petitioners are without standing here. The entire opinion is helpful in examining this question, and the following paragraph is particularly applicable:

> *"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do*

so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion.''

Thus the Federal court determined for itself when the contract rights arose and the transactions were closed. It required a construction of the State statute to determine whether any rights had become vested, but this did not deter the Supreme Court of the United States from acting independently of the State courts. Likewise, in the case at bar, Mr. Justice Hawley considered that the suit pending in the Circuit Court involved a transaction already closed and contract rights already vested. We quote from his opinion as follows:

> "In the present case the transaction between the parties, under the ordinance of 1900, was closed; nothing was left to be done except to collect the license due, which was authorized by the law then in force. Upon the facts of this particular case, can it be said that it was the intention of the Legislature, by the passage of the act of 1901, to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?''
>
> 122 Federal Reporter, page 27.

The case of *Burgess v. Seligman* was approved in

> *Pleasant Township v. Etna Life Insurance Co.*, 138 U. S., page 67,

the Court using the following language:

> "Was the act of 1880 in conflict with the constitution of Ohio? The Supreme Court of the State has said that it was, 37 Ohio St. *supra.* We are not concluded by that determination. In matters of con-

> tract, especially, the right of citizens of different States to litigate in the Federal courts of the various States, is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess v. Seligman*, 107 U. S. 20, 33."

This exception to the general rule touching the duty of the United States courts to adopt and follow the construction of State Statutes, made plain by these cases has governed the Federal courts in their decisions ever since.

In the case of

> *Louisville Trust Co. v. City of Cincinnati*, 76 Federal Reporter, page 301,

the Circuit Court of Appeals holds as follows:

> "So we think another well-grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the State whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while 'leaning to an agreement with the State court,' exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of State statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute, if such decisions were rendered after the rights involved in the controversy originated." Citing *Burgess v. Seligman.*

The rule laid down in *Burgess v. Seligman* was followed in

Starkes v. Board of Commissioners, 77 Federal 580;
Bartholomew v. Austin, 85 Federal, 366;
Caesar v. Capell, 83 Federal, 427;
Jones v. Gt. Southern Hotel Co., 86 Federal, 373.

An examination of these cases will show that the Circuit Court of Appeals has never reversed a decision of the Circuit Court determining rights in the nature of contract depending on the construction of State statutes where these rights arose before the construction of the State statutes by State courts, and above all, where there was no decision of the State courts on the subject until after the opinion in the Circuit Court had been rendered.

In

National Foundry, etc., Works v. The Oconto Water Co., 68 Federal, page 1008,

the Court disposes of the matter in the following language:

> "Second. In *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43, affirmed, upon appeal, 7 C. C. A. 603, 59 Fed. 19, involving the mechanic's lien claim here asserted, this court held that under the law of Wisconsin a mechanic's lien existed for the materials furnished the Oconto Water Company in the construction of its plant. Since the affirmance of that decree by the circuit court of appeals, the supreme court of Wisconsin, in the case of *Chapman Valve Manuf'g Co. v. Oconto Water Co.*, 60 N. W. 1004, with respect to the construction of the plant in question, has held that no mechanic's lien exists un-

der the laws of Wisconsin for labor and supplies furnished a quasi public corporation furnishing water supply to the public. This decision reverses the former holdings of that court referred to in the opinion of this court reported in 52 Fed. 43, and in conformity to which holdings that *decision was made*, and changes the public policy of the state in respect to the application of the mechanic's lien law to a quasi public corporation. The question is therefore sharply presented whether this court should, in regard to this particular property, in respect to which it has determined that a lien exists, recede from its position in deference to the changed position of the supreme court of Wisconsin, and should follow its latest holdings. It is without question the duty of the federal court to avoid conflict with the well-settled decisions of the state courts, and they will lean towards an agreement of views if the question is balanced with doubt; but where, at the time of a decision by a federal court, there has been no settled construction by the supreme court of a state of a statute of that state, the duty is devolved upon the federal court to determine that question independently, and a federal court is not called upon in such a case to reverse its judgment in that case because the supreme court of the state has subsequently reached a different conclusion."

We quote from

Central Trust Co. v. St. Ry., 82 Fed. Rep., 4.

"When a federal question is involved, the decision of the highest court of the state is not final, but is reviewable by the supreme court of the United States. To this extent, at least, the judicial power of a state is subordinate to that of the United States. But there is no relation of subordination on the part of any federal court to any state court. In certain cases the federal courts, of their own motion, follow the decision of the state court, as determinative of the rights of a

litigant. In *Forsyth v. City of Hammond,* decided April 19, 1897, by the supreme court of the United States (17 Sup. Ct. 665), it was ruled that a late decision of the supreme court of Indiana on the validity of proceedings under Indiana Statutes enlarging the boundaries of the city of Hammond was law for the parties, especially in view of the circumstance that Mrs. Forsyth herself had taken the appeal which resulted in that decision, and in view of the further circumstance that the state decision was upon essentially the specific controversy afterwards, in another form, made the subject of litigation in the cause before the supreme court of the United States. But where the controversy concerns a contract, and the meaning of the contract depends on the construction of a state statute or a provision of a state constitution, a decision on the meaning of said statute or constitutional provision by the highest court of a state, made after the contract was entered into, and rights had vested thereunder, is not conclusive upon a litigant in a federal court. The litigant in such a case is entitled to the independent judgment of the national tribunal." Citing *Burgess v. Seligman.*

The only decision of the California Supreme Court, throwing any light upon this question, which the Circuit Court had before it at the time of its decision, was the case of

City of Oakland v. Whipple, 44 Cal., 303,

and that case fully supports and is authority for the conclusions reached by the Federal courts, and in its opinion, the Circuit Court of Appeals makes the following reference to that case:

> "In the *City of Oakland v. Whipple,* 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the

action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before judgment and it was there, as here, contended that the act passed in 1870 (St. 1869-70, p. 722, c. 493) repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied. The court said:

'To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the Legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the Constitution would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force.' ''

This was the law as declared by the Supreme Court of California at the time the Circuit Court gave judgment in this case, and such judgment was in full harmony therewith. If it be a fact, that subsequent to the decision of this case by the Circuit Court, the California Supreme Court has departed from the rule announced by it in *City of Oakland v. Whipple*, this Court will not review the decision of the Court of Appeals merely to make the decision harmonize with the latest expression of opinion, by departing from the rule first announced.

Federal courts may not anticipate the decisions of State Courts, nor are they required to change their decisions to make them accord with decisions of State courts subsequently announced.

We think it clear under the authorities above cited that this record does not present a conflict within the meaning of the term as used in the decisions. Nor are the questions here presented of that gravity or importance which justifies the interposition of this Court.

Every case is of gravity to the parties to it, but every case is not of the gravity which justifies this extraordinary writ. This view was well expressed

In re Woods, 143 U. S. 205-6,

> * * * "the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice."

And in

Forsyth v. Hammond, supra,

at page 513, this Court again said:

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice."

The same principle is forcibly expressed by Mr. Justice Gray in

Amer. Const. Co. v. Jacksonville Railway, supra,

at page 382, in the following language:

> "The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgments of that court final, except in extraordinary cases."

And further along, in the same opinion, at pages 383-4, in speaking of the only two instances in which the writ had hitherto been issued, it is said:

> * * * "while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in *Lau Ow Bew's Case,* above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner,* No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge, and was dissented from by one of the three Circuit Judges; and in each of these cases the Circuit Court of Appeals had declined to certify the question to this court."

It will be noted that no similar question is here presented; that the judgment of the Circuit Court of Appeals *affirmed* the judgment of the Circuit Court; that the decision was by a *unanimous* Court, and, further, that the Court of Appeals had not declined to certify the question to this Court. On the contrary, it had not been asked to so certify such question.

It is respectfully submitted that the writ prayed for should not issue.

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